

**The U.S. Army Corps of Engineers’
Guidance for
Wetland and Stream Mitigation and
Mitigation Banking
in the
Omaha District**



Karen Lawrence coordinated in consultation with the following: Dr. Robert Brumbaugh, Omaha District's field office personnel, Mike Gilbert, Dave LaGrone, Nebraska Mitigation Review Team, Mr. Jack Chowning, and many others.

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Omaha District Guidance for Wetland and Stream Mitigation and Mitigation Banking

PART A: INTRODUCTION

I. PURPOSE AND SCOPE:

The purpose of this document is to provide District guidance for wetland and stream mitigation/banking. This guidance was created to better assist the Omaha District regulatory staff, applicants or potential bank sponsors, and other interested parties in the mitigation/banking process to reach the goals of Section 404 of the Clean Water Act. Included are the guidelines for establishing mitigation and for establishing, owning and operating mitigation banks. This document further sets out the guidelines for authorizing applicants (e.g., individuals, corporations, units of government) to withdraw credits from a mitigation bank to offset unavoidable wetland impacts that would result from the applicant's proposed activity. Also included are some attachments that serve as a template or examples to further assist in the development of a mitigation bank.

The Mitigation Banking program was established to provide options for lessening the cost and regulatory burden of replacing wetlands or mitigating impacts when it is required under regulatory programs. Banking also lessens the Corps field office personnel's workload by reducing the number of compliance inspections (mitigation aggregated into large complexes that can be evaluated). Some other advantages of mitigation banking include; implementing compensation prior to impacts occurring that will reduce temporal losses of the aquatic habitat functions; reducing the regulatory processing time; bringing together proper expertise and financial resources; aiding in the integrity of the aquatic system by allowing larger complexes; and contributing to the president's goal of no-net-loss of the Nation's wetlands.

II. POLICY CONSIDERATION:

The Omaha District's intent is for this guidance to be applied to mitigation and/or mitigation banks proposed on or after the effective date of this guidance and to those in early stages of development. Any permit or mitigation bank instrument that has already been approved and signed will remain intact. Because of the nature of umbrella agreements (mitigation banking term), discretion of the local Mitigation Banking Review Team (MBRT) will determine if modifications need to be made.

Nothing in this document should be interpreted as a promise or guarantee that a project that satisfies the guidance within this document will be assured of a permit. The District Engineer (DE) has a responsibility to consider each project on a case-by-case basis. Also, this documents does not change any requirements that may be required in the Section 404(b)(1) guidelines or any other applicable documents.

III. APPLICABLE ENVIRONMENTAL LAWS AND REGULATIONS.

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify existing policies, not to establish new requirements. Projects deemed appropriate for mitigation must demonstrate full compliance with existing Federal, State and Tribal statutes and regulations as well as consistency with applicable policies, including, but not limited to:

- Clean Water Act {33 U.S.C.1251 et seq.}, Section 404 and Section 401.
- National Environmental Policy Act {42 U.S.C. 4321 et seq.} and implementing regulations.
- The Fish and Wildlife Coordination Act {16 U.S.C. 661-666 (c)}.
- The U.S. Fish and Wildlife Service Mitigation Policy (January 23, 1981),
- The Rivers and Harbors Act of 1899 {33 U.S.C. 403}.
- Section 404(b)(1) Guidelines {40 C.F.R., Part 230}; including interpretations of the Guidelines in the Memorandum of Agreement between EPA and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines {February 6, 1990}.
- Federal Permit Regulations {33 C.F.R., Part 320-330} including interpretive guidance provided by the U.S. Army Corps of Engineers.
- State Water Quality Certification (Section 401).
- Endangered Species Act, as amended {16 U.S.C. 1531-1543}
- Federal Agriculture Improvement and Reform Act of 1996 {7 U.S.C. 7201}.
- National Environmental Policy Act {16 U.S.C. 470 et seq.}.
- Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, (28 December, 1995.).
- Title XII of the Food Security Act of 1985
- Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended (49 CFR Part 24)
- A Corps of Engineers Memorandum - Regulatory Guidance Letter 93-2 (August 23, 1993)
- A Corps of Engineers Memorandum - Regulatory Guidance Letter 02-2 (December 24, 2002)

IV. OTHER PROCEDURES

This guidance may be subject to change subsequent to the receipt of additional national guidance on this issue. Subsequent guidance related to the development and operation of mitigation banks will be issued as the need arises.

Within one year of issuance, the district coordinator and state program managers will review this guidance for adequacy, applicability and/or acceptability. The district coordinator will consider any proposed modification, additions or deletions to this guidance, and upon consensus, make necessary changes. Thereafter, review will take place at a minimum of every two years.

PART B: MITIGATION (All types of aquatic resources)

I. GOALS AND PRINCIPLES

THE MITIGATION SHOULD LAST AS LONG AS THE IMPACTS. The goal of any mitigation is to replace physical, chemical, and biological functions of Waters of the United States by providing compensation of unavoidable impacts due to regulated activities. Mitigation can be achieved through restoration, creation, enhancement or preservation. Wetland functions include, but are not limited to, the following: groundwater recharge/discharge; flood flow alteration; fish/shellfish habitat; sediment/toxicant retention; nutrient removal; production export; sediment/shoreline stabilization; wildlife habitat; recreation; educational scientific value; uniqueness/heritage; and visual quality/aesthetics.

IT IS CRITICAL THAT ALL SUCCESS CRITERIA BE SUSTAINABLE. The goal of any mitigation is to successfully meet, record and convey the objectives of the success criteria identified within the permit or banking instrument. Structural goals should include: the size of the proposed wetland or stream reach, its location in the landscape and the upland buffer or adjacent habitat areas; acreage figures for each cover type; and the projected hydrologic regime including hydroperiod and water depths.

Functional goals should have the following characteristics: Specific identified compatible functions; functions expressed as measurable units (i.e. water storage); and the appropriate actions/structures to achieve each function listed as elements in the site plan. (Also see Appendix B for Checklist and Supplement).

The following Corps of Engineers Environmental Operating Principles should guide mitigation project design. (www.hq.usace.army.mil/cepa/envprinciples.htm)

1. Strive to achieve environmental sustainability. An environment maintained in a healthy, diverse and sustainable condition is necessary to support life.
2. Recognize the interdependence of life and the physical environment.
3. Seek development activities and natural systems by designing economic and environmental solutions that support and reinforce one another.
4. Seek solutions that promote human health and welfare and the continued viability of natural systems.
5. Seek ways and means to assess and mitigate cumulative impacts to the environment; bring systems approaches to the full cycle of our processes and work.
6. Build and share an integrated scientific, economic, and social knowledge base that supports a greater understanding of the environment and impacts of our work.
7. Respect the views of individuals and groups interested in Corps activities, listen to them actively, and learn from their perspective in the search to find innovative win-win solutions to the nation's problems that also protect and enhance the environment.

In addition to these principles, the CEQ (1993) provides the following principles:

1. Take an ecosystem view. (For Watershed maps, see Appendix C)
2. Protect communities and ecosystems.
3. Minimize fragmentation. Promote the natural pattern and connectivity of habitats.
4. Promote native species. Avoid introducing non-native species (or invasive species).
5. Protect rare and ecologically important species.
6. Protect unique or sensitive environments.
7. Maintain or mimic natural ecosystems process.
8. Maintain or mimic naturally occurring structural diversity.
9. Protect genetic diversity.
10. Restore ecosystems, communities, and species.
11. Monitor for biodiversity impacts.
12. Acknowledge uncertainty.
13. Be flexible.

II. EVALUATING PROTOCOL

There are several factors that need to be addressed to determine if the proposed mitigation is adequately compensating for unavoidable impacts to Waters of the US while maintaining the 'No Net Loss Policy' of the Federal Government.

A. GENERAL CONSIDERATIONS (Based on National Research Council's Mitigation Guidelines)

1. Restoration will be the first option because the 'likelihood of success' is greater with restoration sites (Federal Register 60:58605 Nov, 28, 2002?). As part of the restoration process, hydrological conditions should also mimic natural variation.
2. Minimize the need to maintain any over engineered structures.
3. Even degraded or impaired sites can be optimized through mitigation, which can improve the localized landscape.

B. SITE CONSIDERATION

1. Does the site possess the physical, chemical, and biological characteristics to establish a functioning wetland or stream?
2. Does the site possess adequate water? Make sure the site can provide enough water within the geomorphic setting. For example, will there be enough ground water available or rainfall to support the necessary vegetation and soil characteristics?
3. Does the site possess adequate functions to replace functions that are to be lost?
4. Does the site possess adequate protection from development?

5. Does off-site mitigation benefit the watershed more than on-site?

C. EVALUATION CRITERIA

1. Provide the baseline conditions for the proposed project area. This would be a delineation (using the 1987 Corp manual) and assessment of aquatic resources present at the proposed project site before any impacts occur.
2. Quantify the impacts of the proposed project on waters of the US. Include the amount of wetland or stream area filled (square feet or acres), the amount of fill used (cubic yards), and length of stream affected (linear feet). Explain how the proposed project will change the site.
3. Describe how the proposed compensatory mitigation plan will adequately offset any adverse impacts of the proposed project by comparing the baseline assessment (#1 above) and the impact assessment (#2 above).

D. TECHNICAL CONSIDERATIONS

Mitigation/banks should be planned, designed, and constructed to be self-sustaining over time. Though this may not always be possible, functioning self-sustaining wetlands/streams are the ultimate goal.

1. Is hydrology available or could it be within reasonable measures? Are water rights an issue? Although each site should be selected and managed to utilize the natural water storage functions of wetlands, flood control shall not be the primary purpose.
2. Are ecologically significant sites (aquatic, upland, cultural or T & E species habitat, etc.) going to be negatively impacted? (No ecologically significant site should be permanently or adversely affected by the construction or restoration work.)
3. Are there adequate buffer areas either available already or as part of the mitigation?
 - a. For wetlands; vegetated buffer should be at a minimum of 50 feet and continuous.
 - b. For streams; The vegetated buffer will be 25-50 feet wide [7.62 -15.24 meters] on each side of the stream but the DE may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns". When using functional assessments for riparian areas use Table 1 below to determine recommended ranges of buffer widths. Standard approach should be 3 times the bank height.

Table 1: General Riparian Buffer Strips width Guidelines

Functions	Description	Recommended width
Water Quality Protection	Buffers, especially dense grassy or herbaceous buffers on gradual slopes, intercept overland runoff, trap sediments, remove pollutants, promotes ground water recharge. For low to moderate slopes, most filtering occurs within the first 10 meters, but greater widths are necessary for steeper slopes, buffers comprised of mainly shrubs and trees, where soils have low permeability, or where NPSP loads are particularly high.	5 to 30 meters [16.4 to 98.4 ft]
Riparian Habitat	Buffers, particularly diverse stands of shrubs and trees, provide food and shelter for a wide variety of riparian and aquatic wildlife.	30 to 500+ meters [98.4 to 1640.4ft]
Stream Stabilization	Riparian vegetation moderates soil moisture conditions in stream banks, and roots provide tensile strength to the soil matrix, enhancing bank stability. Good erosion control may only require that the width of the bank be protected, unless there is active bank erosion, which will require a wider buffer. Excessive bank erosion may require additional bio-engineering techniques (see Allen and Leach 1997)	10 to 20 meters [32.8 to 65.6 ft]
Flood Attenuation	Riparian buffers promote floodplain storage due to backwater effects; they intercept overland flow and increase travel time, resulting in reduced flood peaks.	20 to 150 meters [65.5 to 492.1 ft]
Detrital Input	Leaves, twigs and branches that fall from riparian forest canopies into the stream are an important source of nutrients and habitat.	3 to 10 meters [9.8 to 32.8 ft]

E. OTHER

1. Mitigation plans will be provided to other identified agencies for all standard permit actions. If the completed plan is not available during the public notice period then the other agencies will have 5-7 business days to respond once it is available.
2. All mitigation will need site protection. This can be in the form of an easement, deed restriction or similar legal instrument (See Appendix I1 and I2).
3. Force Majeure: Unexpected and disruptive forces that are beyond what would be considered as normal or natural disturbances. Typically damages caused by floods, droughts, muskrat/geese and storms are not considered disruptive forces.

III. SUCCESS CRITERIA/ASSESSMENT

The Omaha District will continue to review and evaluate assessment methods that would provide the most complete data. At a bare minimum, the following data will be provided to assess each project.

A. Routine method: used for small, simple or non-controversial situations. Use the Floristic Quality Index (FQI); $FQI \text{ score} \times \text{acres} = FCU$ (functional capacity units) to get the impact score and then to get the mitigation score (the score will determine how many acres to mitigate). This will also be the basis of the success criteria. (See Appendix J) This method will be applied to the buffer area separate from the wetland area.

B. Comprehensive Method: Used for large, complex or controversial situations. Use a more detailed functional assessment such a Hydrogeomorphic Assessment Method, Wetland Rapid Assessment Procedure, Montana Department of Transportation (MDT) Montana Wetland Assessment Method or other District approved method.

NOTE: Some of our 6 states do not currently have access to the Floristic Quality Index's coefficient of conservatism but will implement this method as soon as they become available. For those states that cannot utilize the Routine method the following should be applied:

C. Minimum Evaluation Criteria

1. Site meets the Corps of Engineers' delineation criteria
2. Vegetation
 - Native species cover and richness should constitute between 60-80% of the vegetation suitable for the project's water regime and site's potential. Actual percent will be determined in part by an evaluation of nearby reference (native) wetland sites.
 - Dominant species present ratios should be based on regional conditions and wetland type.
 - Invasive species cannot make up more than 10% in the third growing season after construction is finished.
3. Hydrology

Inundated or saturated for the appropriate amount of time for the wetland type.
See Table 5 Hydrologic Zones of 1987 Corps Manual.
4. Upland Buffer
 - Native species cover and richness should constitute between 60-80% of the vegetation suitable for the region with no more than 10% invasive species in the third growing season.
 - Dominant species present ratios should be based on regional conditions and benefit/protect the wetland.
 - Area must remain undisturbed (no mowing, pesticides use, etc.).

IV. MONITORING AND REPORTING

A. Monitoring shall occur for a period of no less than five (5) years for emergent wetland systems or riverine systems and ten (10) years for forested wetland systems from the first growing season after the completion of the approved planting plan. The last three (3) years should be without intervention in the form of irrigation, removal of undesirable vegetation or replanting of desirable vegetation. The monitoring results of the mitigation shall be provided to the Corps on an annual basis during the monitoring period. The monitoring report should provide sufficient written and graphic description for the Corps to evaluate the effectiveness of the mitigation effort. After the required monitoring period, the Corps will determine if, based on whether or not the site has achieved the success criteria, the monitoring reports need to continue.

B. Minimum field inspections by all parties shall be conducted on an annual basis. The Corps will coordinate with the applicant to establish a compliance-monitoring schedule. Based on success criteria progression, the Corps may require the applicant to conduct remediation.

C. The applicant will be responsible for all monitoring, management, reporting and remedial corrective measures, if needed. However, subcontractors, or public or private organizations may perform the work.

PART C: MITIGATION BANKING

I. ROLE OF SPONSOR AND MITIGATION BANKING REVIEW TEAM (MBRT)

A. Sponsor: The bank should be owned and/or under the full control of the bank sponsor. The sponsor is responsible for the preparation of the banking prospectus, instrument and monitoring reports in consultation with the MBRT. The bank sponsor shall establish in a performance bond, escrow account, irrevocable letter of credit or other financial surety, adequate funds to ensure the construction, planting, and monitoring (short-term and long-term), management and maintenance of the mitigation bank wetlands and associated uplands and assurance of perpetuity.

B. Mitigation Banking Review Team: The MBRT will be comprised of federal, state, local and/or tribal government representatives who will oversee all phases of a mitigation bank, the chair, usually being the Corps of Engineers. The primary role of the MBRT is to facilitate the establishment of mitigation banks through the development of the instrument. The MBRT is responsible for providing feedback and guidance and for determining if the bank or any supporting documentation would be appropriate for this site and type of bank. Ultimately, the MBRT will approve and activate the bank (upon the final signature from the Corps District Engineer). No agency is required to sign a banking instrument; however, in signing a bank instrument, an agency agrees to the terms of that instrument. All voting members must be from a federal, state or tribal government agency. No agency (or agency acting on behalf of another entity) that holds the role of sponsor can be on the MBRT.

II. IMPLEMENTATION PROCEDURES:

It is imperative that all participants in the banking process understand how the bank is to be sited, constructed and operated. The following procedures are intended to ensure success and to minimize the potential for misunderstanding while adding predictability to the process. Parties interested in establishing a mitigation bank should follow the steps below when coordinating bank development:

1. Identify the bank sponsor. A mitigation bank may be either publicly or privately owned. Publicly owned banks are established through any municipal, county, regional, state or federal agency.
2. Contact the MBRT early in the process via the Corps of Engineers to participate in planning of the mitigation bank (i.e. site selection, development plan design, success criteria designation, monitoring and remediation plan development, etc.).
3. Identify the parties responsible for acquiring, developing, managing and monitoring the mitigation bank site, including the responsibility for accounting of bank credits.

4. Included with the formal 'notice of intent' should be the following:
 - a. Department of the Army permit application to conduct any work within existing waters of the United States that is necessary to establish the bank. If a Department of the Army permit is not needed, a permit application is not required.
 - b. A plan that details the goals, objectives, and success criteria for creating wetlands, including wetland types and their respective acreage.
 - c. Provisions that address long-term management.

III. COMPONENTS

It is intended that mitigation banks are to be used primarily to mitigate wetland or stream impacts associated with permitted projects.

Projects initiated independent of a bank instrument or prior to an approved bank instrument will not be considered. Notification to the Corps of intent to use a site for mitigation banking purposes is required prior to the initiation of physical work to create the bank. The MBRT will provide general assistance to potential bank sponsors in developing their specific mitigation bank instrument provided the bank sponsors follow the guidelines developed in these procedures.

A. Prospectus. Official 'Notice of Intent' to the Corps and the MBRT. Bank sponsors are encouraged to discuss their proposal with the appropriate Corps of Engineers' office prior to a formal request to establish a mitigation bank (pre-application coordination). Prospective bank sponsors will first submit a prospectus to the Corps of Engineers to initiate the official planning and review process by the appropriate agencies. The prospectus will include sufficient information concerning the objectives for the bank and how it will be established and operated to allow the MBRT to provide feedback and guidance.

In all cases of proposed banking, the Corps will issue a public notice, including the prospectus, describing the project. The public comment period for submittal of relevant comments on the bank prospectus will be a minimum of 21 days. If a Department of the Army permit is needed in order to construct, restore, or enhance wetlands/streams on the bank site, the Corps will follow normal permit processing procedures.

The prospectus will eventually become the basis of the mitigation bank instrument and should contain:

1. The bank location and boundaries (size);
2. Delineation of any wetlands or other jurisdictional areas that may exist at the proposed bank location;
3. The type of real estate interest in bank property;
4. A legal description of the property;
5. The type of banks (i.e., single client, joint project, commercial, etc.);
6. The goals and objectives of the bank;
7. The method of credit production (i.e., restoration, creation, enhancement, preservation), description of the assessment methodology used for credit

certification (must be consistent with the project impact assessment methodology), the number of proposed credits by each method, and the rationale for crediting;

8. A statement as to compliance with this document;
9. A general site plan showing the location of all features such as existing and proposed wetland and upland habitats, roads, trails, structures, utilities, and any other existing or proposed site improvements;
10. An outline of management and maintenance responsibilities;
11. A preliminary construction plan and schedule of completion, preliminary planting plan, preliminary administrative, management, monitoring, and financial plans, and;
12. Documentation of "Incorporation" for the mitigation bank, if appropriate;
13. Proposed Geographical Service Areas using the 8-digit Hydrologic Unit Classification (HUC) or with ecological justification for larger service area, and approved by MBRT.

B. Instrument.

1. A formal, written banking instrument, developed in cooperation with the MBRT must support each mitigation bank that includes all involved parties as signatories. This instrument should use as a template, the draft banking instrument and contain, at a minimum, the information contained in the basic outline of a banking instrument (See Appendix F). Depending upon the nature of the bank, a permit for wetland alteration may be required as a condition of the banking instrument.

2. Mitigation banks generally must be functioning consistently with the success criteria developed for each particular bank, prior to the withdrawal of credits. In certain instances, limited withdrawal of credits may be allowed prior to demonstrated functional success. All of the following requirements must be satisfied prior to pre-function early credit withdrawal:

- a. The bank sponsor has performed a functional assessment on the bank site and demonstrated to the MBRT that the site has a high probability for functional success;
- b. The banking instrument and final mitigation plans have been approved;
- c. The bank site has been secured; and
- d. The appropriate financial and legal assurances have been established.

3. In-kind compensation is required and preferable to out-of-kind compensation unless the proposed compensation (out-of-kind) is generally regarded to have a more ecological benefit to the overall watershed, as determined by the MBRT and/or the Corps.

4. Based on a functional assessment for both the impact site and the mitigation site, the focus is on providing the replacement of the primary functions, but attention should include all possible improvements to provide the widest range of functions available. Mitigation bank credits used for a particular project must provide maximum

practicable replacement of the (otherwise uncompensated) functions lost as a result of the activity (i.e., no overall net loss of functions).

5. Where impacts from an activity will be offset by reliance in whole or in part on a mitigation bank, the permit or certification shall include purchase of bank credits as a condition of the Section 404 permit or Swampbuster provision. The bank must also have credits available.

6. Individual site-specific banking instruments must specify that the bank sponsor or long term manager of the bank site is responsible for the long-term success, perpetual protection and/or passive management of the bank, and for providing remedial actions if the bank fails. Also, individual site-specific banking instruments must authorize Right-of-Entry to any representative of the MBRT.

7. After-the-fact projects that cannot be mitigated on-site can be debited at higher ratios than pre-approved projects when there is difficulty in determining the impacts of the affected wetland.

8. The Omaha District will continue to review and evaluate assessment methods that would provide the most complete data. At a bare minimum, the following data will be provided to assess each project.

a. Routine method: used for small, simple or non-controversial situations. Use the Floristic Quality Index (FQI) - FQI score x acres to get the impact score and then to get the mitigation score (the score will determine how many acres to mitigate). This will also assist the set up of the success criteria. (See Appendix J) This method will be applied to the buffer area separate from the wetland area.

b. Comprehensive Method: Used for large, complex or controversial situations. Use a more detailed functional assessment such as Hydrogeomorphic Assessment Method, Wetland Rapid Assessment Procedure, MDT's Montana Wetland Assessment Method or other District approved method.

NOTE: Some of our 6 states do not currently have access to the Floristic Quality Index's coefficient of conservatism but will implement this method as soon as they become available. For those states that cannot utilize the Routine method the following should be applied:

Minimum Evaluation Criteria (in the absence of functional assessment)

- a. Site meets Corps of Engineer's delineation criteria
- b. Vegetation
 - Native species cover and richness should constitute between >60% (actual regional percentages may vary between 60% and 100%) of the vegetation suitable for the project's water regime and site's potential.
 - Dominant species percent ratios should be based on regional conditions and wetland type.

- Invasive species can not make up more than 10% in the third growing season after construction is finished. Sponsor can gather data from nearby reference sites to fine tune evaluation criteria. Effort must be coordinated with and approved by the MBRT¹.

c. Hydrology

Inundated or saturated for the appropriate amount of time for the wetland type. See Table 5 Hydrologic Zones of 1987 Corps Manual.

d. Upland Buffer

- Native species cover and richness should constitute between 60-80% of the vegetation suitable for the region with no more than 10% invasive species in the third growing season.
- Dominant species present ratios should be based on regional conditions and benefit/protect the wetland.
- Area must remain undisturbed (no mowing, pesticide use, etc.)

9. The Signature page must contain the following information: (See Appendix H)

- a. Bank Name
- b. Who/Agencies that are signing the agreement
- c. The objective of the bank
- d. Geographical Service area
- e. Signatures
 - Sponsor and/or agent for sponsor
 - Each cooperating agency
 - Corps of Engineers (District Engineer)

C. Monitoring and Reporting: (See Appendix G)

1. Monitoring shall occur for a period of no less than five (5) years for emergent wetland systems or riverine systems and ten (10) years for forested wetland systems from the first growing season after the completion of the approved planting plan. The last three (3) years should be without intervention in the form of irrigation, removal of undesirable vegetation or replanting of desirable vegetation. The monitoring results of the mitigation shall be provided to the Corps on an annual basis during the monitoring period. The monitoring report should provide sufficient written and graphic description for the Corps to evaluate the effectiveness of the mitigation effort. After the required monitoring period, the Corps will determine if, based on whether or not the site has achieved the success criteria, the monitoring reports need to continue.

¹ Approved reference site results should be filed with the District Wetland Mitigation Banking Coordinator.

2. Minimum field inspections by all parties shall be conducted on an annual basis. The MBRT will coordinate with the bank sponsor to establish a compliance-monitoring schedule that assures that all mitigation bank sites are inspected for compliance with the approved bank plan. Based on information contained in the monitoring reports and/or agency site inspections, the MBRT may require the bank sponsor to implement a MBRT approved remediation plan.

3. The mitigation bank sponsor shall be responsible for all monitoring, management, reporting and remedial corrective measures, if needed. However, bank employees, subcontractors, or public or private organizations may perform the work.

D. Bank Operational Life

The operational life of a bank shall consist of the period during which the terms and conditions of the banking instrument are in effect. With the exception of arrangements for long-term management and protection of the site in perpetuity, the operational life (at a minimum of five (5) years) of a mitigation bank terminates at the point when:

1. Wetland mitigation credits have been exhausted or banking activity is voluntarily terminated with written notice from the bank sponsor to the Corps of Engineers and
2. The Corps of Engineers has determined that the fully debited bank is functionally mature and/or self-sustaining to the degree specified in the banking instrument and associated documents, including the performance standards (success criteria) outlined in this agreement.

E. Protection / Long term management (For templates see Appendix I)

The wetlands and/or other aquatic resources in a mitigation bank will be protected in perpetuity with the appropriate real estate arrangements (i.e., conservation easements, transfer of title to Federal or State resource agency, local government or non-profit conservation organization). Such arrangements should effectively restrict harmful activities that might otherwise jeopardize the purpose of the bank.

Instances in which the sponsor transfers long-term operation and maintenance of debited wetlands to another entity should be accomplished by transfer of title or by development of a lease agreement. Transfer of title may include a reversionary clause, which will return the title to the original owner in the event lands are not managed for their intended use. Restrictive covenants and conservation easements also affect land management. The Corps of Engineers and any other signatories to the original banking instrument must approve any transfer. A transfer must honor all conditions in the instrument.

IV. CREDIT AND ACCOUNTING

NOTE: An Assessment will be required for all future banks.

A. Credits: Credits from mitigation banks may also be used to compensate for environmental impacts authorized under other programs, such as state or local wetland programs. In no case may the same credits be used to compensate for more than one activity. Once credits have been used, whether for wetland mitigation or another approved program (i.e., endangered species habitat), those credits will be considered used and can not be used again (i.e., 15 credit bank can not sell 15 credits towards wetland mitigation and 15 credits to endangered species habitat (ESH). The bank can sell 5 credits to wetland mitigation and 10 credits to ESH or similar as long as the number of credits truly sold does not exceed the number of available credits). However, if mitigation for a specific project is required under both Clean Water Act and another program, such as Endangered Species Act, for impacts to the same wetland/habitat the credits can count towards mitigation under both programs.

B. Credit Certification. Bank sponsors may request mitigation bank credit certification at any time after a minimum of three (3) years data collection for emergent wetland and seven (7) years for forested wetland systems. Based on the bank sponsors' method of assessment, the MBRT will establish a process or formula (debiting plan) for translating compensation requirements into debits (this will be in the signed instrument).

C. Minimum threshold credit ratios: Because each state within the Omaha District has unique ecosystems actual local ratios may be different. However, no ratio should be below the following:

Wetlands

Ratio A		Ratio B
1:1	Restoration (re-establishment)	1.5:1
1:1	Restoration (rehabilitation)	1.5:1
3:1	Enhancement	4:1
1:1	Establishment	2:1
10:1	Protection/Maintenance	10:1
4:1	Buffer	4:1

Stream/linear mitigation banks (500 feet equals one credit)

1:1	Restoration (re-establishment/day-lighting)	1.5:1
1:1	Restoration (rehabilitation)	1.5:1
4:1	Buffer *	4:1

* Several studies (see applicable literature appendix) have suggested that riparian buffers are very important for functions such as water quality protection, stream stabilization and riparian habitat. Therefore it will be offered at the discretion of the MBRT that banks may have the opportunity to exchange or reduce their ratio for having a more ecologically stable buffer. For every 10 meters (32.8 feet) of appropriate buffer one (1) ratio point can be reduced from the buffer ratio down to the ratio given to the remainder of the bank. (i.e. If the restoration ratio is 1.5:1 then a sponsor could only be able to request an exchange or reduction of 2.5 points in exchange for an additional 25 meters of buffer. Then for the entire bank the ratio to determine credits would be 1.5:1).

Typically ratio determinations should be based on the following conditions:

Condition 1 (Ratio A)

- a. The Bank has met its success criteria (see Part B II for minimum evaluation criteria).
- b. The bank, in its entirety, can demonstrate overall watershed benefits.

Condition 2 (Ratio B) (for pre-credits or out-of-kind. Ratio is slightly higher to account for temporal loss except for preservation and buffer ratios).

- a. Bank has not met success criteria but MBRT has approved the release of pre-credits (no more than 30% of the total bank).
- b. Primary function of the bank's wetland is less or significantly different than impacted wetlands (i.e. out-of-kind or diminished functional capacity)

Example: Restoration

(From Nebraska's draft guidance)

Status	Ratio	Released	Cumulative
Instrument signed	1.5:1	5%	5%
Construction completed	1.5:1	10%	15%
Site meets 1987 COE manual 3 criteria	1:1	15%	30%
Ecologically sound -certified	1:1	70%	100%

V. MITIGATION BANK CREDIT SALES

Upon authorization of the mitigation bank, through a Department of Army permit or interagency agreement, the sale of wetland credits and the creation or restoration of wetlands and buffers may commence. The credits may be sold for mitigation purposes with the following conditions:

1. The Corps of Engineers (with consultation from the MBRT) has sole authority to determine the number of credits available for withdrawal from the mitigation bank.
2. Pre-credits may be sold provided that adequate funds, as approved by the Corps of Engineers, are established through an escrow account, performance bond, irrevocable letter of credit or other financial surety for the generation of credits and long-term maintenance of the required bank site. No more than 30% of the bank may be sold as Pre-credits. Preservation credits, when approved, are considered certified once the instrument and any other appropriate documents are signed.
3. No Department of the Army permits will be granted to applicants proposing to use a mitigation bank unless credits are available in the bank, as determined by the Corps, except where approval by MBRT has been given to the bank sponsor for advanced credits as provided in this section (Mitigation Bank Credit Sales). The initial physical and biological improvements at the bank site (including, but not limited to, grading, planting, and restoration of wetland hydrology) must be completed no later than the end of the first full growing season following the initial debiting of the bank.

4. The bank sponsor shall keep a ledger of all available credits, whether purchased or not, and of all credits sold or otherwise debited. The ledger shall be made available to the MBRT upon request. In addition, the bank sponsor must provide the COE an updated ledger containing a list of all transactions at the conclusion of every credit sale.

VI. TRANSFER BANK ASSETS

A. A sponsor may sell or transfer mitigation bank assets to another public or private entity, or an individual. All purchases or transfers are subject to Corps approval when such bank assets serve as compensation for wetland losses authorized under Section 404. Transfers generally are subject to approved operational banking guidelines and all conditions of any existing agreement. The legal instrument for transferring bank assets must contain either a positive or negative statement relative to credit transfer.

B. Transfer or sale of the mitigation bank may occur to a party willing and financially able to abide by the terms and conditions of the approval agreement entered into by the Corps of Engineers and the bank owner. If only the bank sponsor is changing, no additional public notice is required, but if the change involves the sponsor and some minor changes, then a public notice will be required. Major changes may require a new bank instrument to be developed.

VII. DISPUTE RESOLUTION

A. The MBRT will work to reach consensus on its actions in accordance with this guidance. The Corps is responsible for making final decisions on a project-specific basis regarding the use of a mitigation bank for purposes of Section 404/10 and FSA, respectively. If at any time a MBRT member considers that a particular decision raises concern and a consensus cannot be met then that member may request in writing that the issue be reviewed by the Corps of Engineers' District Mitigation Banking Coordinator.

B. If a sponsor wants to appeal a MBRT decision, they may also do so in writing. A description of the situation and decision should be submitted to the Corps of Engineers' District Mitigation Banking Coordinator. The District Mitigation Banking Coordinator (DMBC) will decide if meetings need to be held to further investigate the appeal otherwise determination will be conducted through correspondence between appropriate parties. A decision can be reevaluated if there appears to be any bias or pressure from any one of the members of the MBRT. If the MBRT decision appears to be logical and based in best available scientific knowledge, the decision will stand. Once a determination has been made a written response will be provided to the sponsor and the MBRT.

C. In either the case of the MBRT member or sponsor, a final dispute may be submitted to the COE's District Engineers or NRCS State Conservationist. The District

Coordinator's recommendations will be included with all disputes reviewed by the District Engineer. Within 30 days, the Corps' District Engineers or NRCS State Conservationist (as appropriate) will consult with the notifying agencies and will resolve the issue.

PART D: APPLICABLE LITERATURE

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